In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1939

No. 127

J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,

Petitioners,

vs.

WALTER SAKOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

J. JOSEPH SULLIVAN,
Shell Building, San Francisco, California,
Attorney for Petitioners.

JULIEN A. HURLEY,
Fairbanks, Alaska,
CHARLES E. TAYLOR,
Fairbanks, Alaska,
JOHN L. McGINN,
Fairbanks, Alaska,
Of Counsel.

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vs.

WALTER SAKOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners* pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals

*Petitioners are referred to herein as defendants; and respondent as plaintiff. All italics in this petition and brief are ours.

for the Ninth Circuit entered into the above entitled cause on 14th day of March, 1940.

OPINIONS BELOW.

In this case there have been two appeals, petitioners being appellants, in each instance. The opinion, in the first appeal, is reported in 98 Fed. (2d) 38. The second appeal is not yet reported. It will be found in Vol. I of the record, p. 446. It is also set out in the appendix, pp. i-vi.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 14th day of March, 1940. A petition for rehearing was filed within the prescribed time and denied on the 3rd day of May, 1940. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

This is an action in ejectment to determine title and right to possession of an unpatented placer mining claim brought under Chapter XCIX, Compiled Laws of Alaska, 1933, p. 753. The action was instituted in the District Court of the Territory of Alaska, Fourth Division.

Plaintiff's contention.

Plaintiff claims that he is the owner and entitled to the possession of the Good Hope placer mining claim, alleged, in his amended complaint, to be situated in the first tier of benches, on the right limit of Otter Creek, in the Otter Recording Precinct, Fourth Division, Territory of Alaska. (R. 2.) That petitioners ousted him therefrom and mined and extracted gold of the value of $45,000.00, to his damage in that amount. (R. 3.)

Respondent prevailed in the lower Court and on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed. (R. 454.)

Plaintiff's claim to title and right to possession of the Good Hope Claim is asserted under a placer mining location *attempted* to have been made by him on October 27, 1930. This location was made under the general mining l vs of the United States, as supplemented by the Alaska Legislature.

Defendants' contentions.

Defendants contend:

1. That defendant Sheppard ever since July 6, 1926, has been the owner of the "Blue Bird" and "North Star" placer mining claims by virtue of two placer mining locations, made by him on that date. (R. 6, 101-111.)

2. That in August, 1930, Sheppard leased the claims to the J. E. Riley Investment Company. (R. 6, 112.)

3. That the company immediately after the execution of the lease, entered into the actual possession of the claims and ever since has been in the actual possession thereof, as lessee, engaged in dredging thereon. (R. 6, 117, 118.)

4. That on October 27, 1930, plaintiff entered and trespassed upon the "Blue Bird" and "North Star" claims and attempted to locate a portion of each of them as the "Good Hoppe" claim. (R. 7, 8.)

5. That at the time plaintiff attempted to locate the "Good Hoppe", it was not unappropriated government land, open to location, but was the *property of Sheppard and in the actual possession of the defendant company as lessee. That plaintiff was a trespasser thereon.* (R. 7, 8.)

Plaintiff's contention as to Sheppard's title.

Plaintiff denied defendants' contentions, and in his reply (R. 8), alleged, that there were certain "flaws" in Sheppard's locations of the Blue Bird and North Star claims, that *rendered them invalid.*

These alleged "flaws" are that Sheppard, at the time of his location, failed:

First. (a) to mark the boundaries of his claims upon the ground so that they could be readily traced;

(b) that no discovery of gold was made by Sheppard *prior to the filing of his location certificates* with the Recorder of the Otter Precinct;

(c) that no location certificates, as required by law, were filed with the Recorder of said Precinct, and that the *pretended certificates of the Blue Bird and*

North Star filed in the Recorder's office did not contain the date of the discovery of gold or of the posting of the location notices; and,

(d) that neither the pretended *locations were tied to any natural object, permanent monument, or well-known mining claim.* (R. 9, 10.)

QUESTIONS SOUGHT TO BE REVIEWED BY THIS PETITION.

The questions sought to be reviewed by this petition are first: Is a certificate of location that describes a placer mining claim, as:

> "being from this initial stake 1320 feet down stream to post no. 2. thence 660 feet cross the creek to post no. 3. thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake.
>
> "this claim is situated on the right limit of Otter creek a Tributary of Iditarod River Otter recording precinct fourth division Territory of Alaska. to be known 'Good Hoppe' claim." (R. 52),

sufficient to meet the requirements of Sec. 2324, Revised Statutes of the United States, which provides, that:

> "All records of mining claims * * * shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."?

The Circuit Court of Appeals has declared such a certificate sufficient, and, in so doing the Circuit Court

of Appeals *has abrogated and frittered away by construction the plain provisions of Sec. 2324, that, "are designed to secure a definite description—one so plain that the claim can be readily ascertained". (Hammer v. Garfield M. & M. Co.,* 130 U. S. 291.)

Second: May a subsequent locator intrude and trespass upon a placer mining claim in the actual possession of another, under claim and color of title, and make his wrongdoing successful, by asserting "flaws" in the title of the one against whom the wrong has been, by him, committed?

The Circuit Court of Appeals has upheld the trial Court, in refusing to submit this issue—although raised by the pleadings and supported by the evidence—as requested by the defendants. (R. 229, 230; Post, appendix p. i.)

VALIDITY OF PLAINTIFF'S LOCATION.

The validity of plaintiff's location is to be tested by the *General Mining Laws of the United States, as supplemented by the Alaska Legislature, in 1915,* as both plaintiff and defendants assert title, and right to possession, to their respective placer mining locations, under these laws.

General mining laws of the United States.

The General Mining Laws of the United States declare that:

> "All valuable mineral deposits in lands belonging to the United States * * * shall be free and

> open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. Sec. 2319; Title 30, U. S. C. A. Sec. 28, p. 40.)"

Sec. 2324 provides that:

> "The location must be distinctly marked on the ground so that its boundaries can be readily traced. *All records of mining claims* made after May 10, 1872, *shall contain* the name or the names of the locators, the date of the location, and *such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.*" (Title 30, U. S. C. A., Sec. 28, p. 151.)

Under this law, in order to make a valid location, it is essential:

1. That the land be vacant, unappropriated public domain.

2. The locator must make a discovery of gold or other mineral within the limits of the claim.

3. The location must be distinctly marked upon the ground so that its boundaries can be readily traced; and,

4. *"All records of mining claims, when required by local rules or customs, shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."* (U. S. C. A., Title 30, Sec. 28, p. 151.)

ALASKA STATUTES RELATING TO CERTIFICATES OF LOCATION.

The provisions of the Alaska law as to the *contents of a certificate of location,* the recording thereof, and the *penalty for failure to comply,* are, as follows:

Certificate of location.

"Section 2. Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

a. The name or number of the claim.

b. The name of the locator or locators.

c. The date of discovery and of posting of the location notice.

d. The number of feet in length and width of claim.

e. It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

A failure to record a certificate of location of claim as herein provided *shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location;* provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator." (Italics ours.)

Failure to comply with provisions of act voids the location.

> "Section 9. That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

In Alaska, therefore, the recording of a certificate of location *is an essential act of location and mandatory; and, failure of the certificate, to reasonably comply therewith, invalidates the location.*

Cloninger v. Finlaison (9 C. C. A.), 230 Fed. 98;
Vedin v. McConnell (9 C. C. A.), 22 Fed. (2d) 753;
Former Appeal (9 C. C. A.), 98 Fed. (2d) 8;
2 *Lindley on Mines* (3rd ed.), Sec. 384.

I.

PLAINTIFF'S LOCATION OF THE GOOD HOPE CLAIM VOID BECAUSE THE CERTIFICATE OF LOCATION FAILS TO MEET THE REQUIREMENTS OF SECTION 2324, REVISED STATUTES.

Plaintiff in order to show compliance with the law that requires a certificate of location to be recorded, introduced in evidence, over defendants' objections (R. 51), a so-called "Notice of Location" which (omitting filing marks) is in words and figures, as follows:

> "October 27, 1930. Notice of Location Notice here be given that I the undersigned hereby locate and Claim 20. (twenty) across of ground for placer mining purposes described as follow to

with being 'from this initial stake 1320 feet down stream to post no 2. thence 660 feet cross the creek to post no. 3. thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake' this Claim is situated on right limit of Otter creek a Tributary of Iditarod River Otter recording precinst fourth division Territory of Alaska to be known Good Hoppe Claim Walter Sakow Locator Vitness Peter Miscovich Gold Discovered Oct. 27. 1930" (R. 52.)

The record shows uncontradicted, that Otter Creek is about 25 miles long. (Sakow's testimony, R. 64.)

It is obvious from a reading of this certificate, that it fails to describe the Good Hope claim with reference to *"some natural object, permanent monument* or well known mining claim" as will "identify the claim".

The only reference in the certificate to a natural object is that it is on the "right limit of Otter Creek" and the Circuit Court of Appeals held, in its first opinion (98 F. (2d) 8, 11), that this "does not identify it. Cloninger v. Finlaison, 9 Cir., 230 F. 98, 100."

The only other references in the certificate are to the "initial stake" by name; and, "post No. 2", "post No. 3", and "post No. 4", by numbers. The Circuit Court of Appeals, in its first opinion, held that these references to the stake and posts *did not describe a permanent monument.* The exact language of the Court being:

"We hold that, *otherwise than in the absence of a description of one of the stakes as a perma-*

> *nent monument,* which may be shown at the trial, the plaintiff's certificate of location is valid in form and content."

The Circuit Court of Appeals having determined that the *reference to Otter Creek did not "identify the claim"* and that there was *"an absence of a description of one of the stakes as a permanent monument"*, should have, then and there, declared the certificate void. But the Court did not do this. It said:

> "The 'stake' and 'posts' referred to in the claim may or may not be permanent monuments and it was for the jury to determine their permanency from the evidence produced."

In so doing the Court erred.

Under the provisions of Sec. 2324, *it is the recorded certificate* that must furnish the information as to where the location of the claim may be found upon the ground; and, the fact that a stake or post mentioned—but not described in the certificate—may in fact be a permanent monument *is immaterial,* if the *certificate itself* fails to make an intelligent reference, to a natural object or permanent monument, so that a person interested in finding the claim could do so, with reasonable certainty, by going to the natural object or permanent monument referred to in the notice.

That this construction is correct is evident from the plain language of Sec. 2324; the decisions of this Court; and, earlier decisions of the Circuit Court of Appeals for the Ninth Circuit, when called upon to construe Sec. 2324.

OBJECT AND PURPOSE OF SEC. 2324, REVISED STATUTES.

This Court in *Hammer v. Garfield Mining & Milling Co.,* 130 U. S. 291, 299, in speaking of the provision of Sec. 2324, which requires that all records of mining claims:

> "shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim",

said:

> "These provisions, as appear on their face, are designed to secure a *definite description—one so plain that the claim can be readily ascertained.* A reference to some natural object or permanent monument is named for that purpose."

The Circuit Court of Appeals for the Ninth Circuit, in *Cloninger v. Finlaison* (Alaska), 230 Fed. 98, 100, said, in speaking of a certificate of location, that,

> "a creek or a river without other description, will not answer for the natural object required by the statute, *so as to give the claim definite location,* and meet the requirements of Sec. 2324, Revised Statutes, which provides *that the monument or natural object must be such 'as will identify the claim'."*

The same Court in *Smith v. Cascaden* (Alaska), 148 Fed. 792, 794, laid down this *test,* as to the sufficiency of the recorded notice involved in that case, as follows:

> "The question then, is whether, in view of the *customary mode of describing mining claims in the Fairbanks district in Alaska, a person with the information which this recorded notice gives*

could find the location of this particular claim on the ground with reasonable certainty by going to the natural and permanent objects referred to in the notice. If he could, the notice is sufficient. North Noonday Mining Co. v. Orient Mining Co. (C. C.), 1 Fed. 522."

FLOATING OF CLAIMS ONE OF THE EVILS DESIGNED TO BE CORRECTED BY SEC. 2324.

One of the evils designed to be corrected by Sec. 2324, Revised Statutes, *was the floating of claims.* This was vividly pointed out by Judge Beatty, in *Gleeson v. Martin White M. Co.*, 13 Nev. 466. This case was decided, in 1878, four years after the Mineral Act, of 1872 was enacted. The opinion says:

"The record, if it consisted of a *mere copy of the (posted) notice,* would not *identify the claim* and there would be an opportunity as well as a temptation to the locators, *upon the discovery of a more valuable mine in the vicinity,* to prove by *perjured witnesses,* that their notice was posted on that mine. *The floating of claims was by no means an infrequent occurrence* prior to the act of 1872, and if such attempts were seldom completely successful, *they were always vexatious, and often the means of levying a heavy blackmail. It was on this account that the record* (not the notice) *was required to contain 'such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim'.* (R. S. 2324.)"

See also:

Brown v. Levan (Idaho), 46 Pac. 661, 664;
Darger v. Le Sieur (Utah), 30 Pac. 363, 365;
Drummond v. Long (Colo.), 13 Pac. 543, 544.

We ask, how any person from a reading of this certificate, and, with the information that it gives, could find the location of the Good Hope Claim with reasonable certainty? Where would a person go to look for the *stake or posts* referred to? Would *they* be near the mouth of the creek, center, near its source, or in between?

Again, there is nothing in the certificate, that would prevent plaintiff from floating his claim to any place on the right limit of Otter Creek, in order to covet his desires or to *cover a subsequently discovered pay-streak.* (R. 203, 204.)

Can the Court, from the description in the certificate give *"the claim a definite location"?* Can the Court say that there is *"a definite description—one so plain that the claim can be readily ascertained"?*

These questions are answered, by the language, of the District Court of Alaska, in *Fuller v. Harris,* 29 Fed. 814, 817, as follows:

> "There is neither a natural object, or permanent monument, or any designation or mark, by which the placer claim can be identified. *The idea that such a record complies with the law, or that it imparted any notice or information to the public is too absurd to require serious consideration.* The liberality extended by Congress to prospectors and miners was not *intended to entirely dispense with legal rules, or abrogate fundamental principles of law."*

The Circuit Court of Appeals, after holding, that the reference to the right "limit of Otter Creek" does not "identify the claim"; and, that the certificate does

not describe a "permanent monument"; nevertheless, leaves for the determination of the jury, the question whether the stake and posts referred to, by name and numbers, are in fact, "permanent monuments"; when, the *Court must know, as a fact, from "the testimony of their own senses"* that, even if they are permanent monuments that that fact cannot aid or cure the failure of the certificate to refer to some object as will identify the claim.

If the reference to the right limit of a creek 25 miles long does not "identify the claim", how can a reference to some stakes or posts—by name or number without further description—that have been established somewhere on the right limit of this creek make the certificate any more definite?

There is nothing in plaintiff's certificate that informs any one where the initial or other stakes are situated on the right limit of Otter Creek. There is *nothing* that gives *one seeking the locus of the claim even an inkling of something in the nature of an "initial point" from which to start.* And when it is considered that Otter Creek is 25 miles long and "zigzagged back and forth" (R. 90, Appellee's Plat, R. 81)—and was first staked in 1909 (R. 90), and, that the corners of the claims, since located, were established by stakes and posts driven in the ground—it is apparent that to find the stake and posts mentioned in the certificate would require an *endless search for, and an examination of, every stake on the right limit of Otter Creek, from its mouth to its source, until the stake or posts are found.*

Particularly is this so when it is considered that the certificate fails to describe the character of the stake or posts. That there is nothing to indicate whether they are two feet high, four feet high or six feet high or what their dimensions are otherwise; or whether they are plainly visible or not.

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals, in sustaining the validity of the certificate of location, has held (in the second opinion appendix p. v, R. 451) that a stake or post:

> "may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground and can be readily seen and identified by a person honestly seeking to find the claim" (Appendix p. v, post, R. 451)

and also that it was:

> "for the determination of the jury * * * whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. * * * and the instructions given on the subject were correct." (Appendix p. v, post, R. 451.)

In so doing the Circuit Court of Appeals *has committed grave error.*

First. It has disregarded the fundamental rule *that the construction of all written instruments and their legal effect "belongs to the court".*

Second. It has decided an important question of Federal and local laws, of far reaching importance, to every mining community in the United States, where the general mining laws of the United States are in force:

A. Contrary to the plain provisions of Sec. 2324, Revised Statutes of the United States, which provides that:

> "*All records of mining claims hereafter* made shall contain the name or names of the locators, the date of location, and *such a description of the claim or claims located by reference to some natural object* or *permanent monument as will identify the claim.*"

B. Contrary to the plain provisions of subdivision e, Sec. 2, Ch. 10, Laws of Alaska 1915, page 12, that provides, that the location certificate:

> "shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments."
>
> "A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to relocation; * * *."

and, of Sec. 9, of said law, that provides:

> "That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

C. Contrary to, and in conflict with, the decisions of this Court, in:

Hammer v. Garfield Milling & Mining Co., 130 U. S. 291;

McKinley Creek M. Co. v. Alaska Min. Co., 183 U. S. 563, 46 L. ed. 331;

Bennett v. Harkrader, 158 U. S. 441, 39 L. ed. 1046.

D. Contrary to, and in conflict with, its own decisions, and particularly, the following decisions, on appeal from Alaska.

Smith v. Cascaden, 148 Fed. 792;

Cloninger v. Finlaison, 230 Fed. 98;

Vedin v. McConnell, 22 F. (2d) 753.

E. Contrary to, and in conflict with, the decision of the United States Circuit Court of Appeals, Eighth Circuit, in *United States v. Sherman*, 288 Fed. 497, 499, where the Court said:

> "The descriptions given in the location certificate were not such as to identify the claim with reasonable certainty, which also rendered the location void. Erhardt v. Boaro, 113 U.S. 527, 28 L. Ed. 1113; Marshall v. Mining Co., 1 S.D. 350, 47 N. W. 290; Regan v. Whittaker, 14 S.D. 373, 85 N.W. 863."

F. Contrary to and in conflict with, the following Federal and State decisions:

Faxon v. Barnard (C. C. Colo.), 4 Fed. 702, 704;

Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911;

Bismark Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 Pac. 14;
Dillon v. Bayliss (Mont.), 27 Pac. 725, 726;
Darger v. LeSieur (Utah), 30 Pac. 363, 364;
Flavin v. Mattingly (Mont.), 19 Pac. 384;
Brown v. Levan (Idaho), 46 Pac. 661, 663;
Drummond v. Long (Colo.), 13 Pac. 543;
Clearwater etc. v. San Garde (Idaho), 61 Pac. 137, 138;
Brady v. Husby (Nev.), 33 Pac. 801, 803;
Gilpin Co. v. Drake (Colo.), 9 Pac. 787;
Baxter etc. v. Patterson (N. M.), 3 Pac. 741, 742;
Purdum v. Laddin (Mont.), 59 Pac. 153 (cited with approval in *Vedin v. McConnell,* supra);
Londonderry v. United Gold M. Co. (Colo.), 88 Pac. 455, 457.

IMPORTANCE OF THE QUESTIONS INVOLVED.

In determining the importance of the questions involved it is well to consider, the purpose of the statutes and local rules, that require certificates of location to be recorded, and prescribe their content.

It is a matter of mining history, that the first concerted acts of miners, in a new mining district, is to organize, by establishing a recording office and electing a recorder. No mining district of any importance ever existed, so far as we know, where such steps were not taken. The miners at the very outset provided means for definitely ascertaining the *locus* and extent of the

ground appropriated for mineral purposes, by requiring a definite description thereof; in order, that the *location of the claim could be readily determined and, in order to bar fictitious floating and fraudulent locations.*

ALASKA LAWS SUPPLEMENTAL TO THE GENERAL MINING LAWS OF THE UNITED STATES.

The Organic Act, creating a Legislative Assembly in Alaska and conferring legislative powers, was enacted by Congress, and approved, August 24, 1912. Prior to that time, there was no *Congressional law* requiring a certificate of location to be recorded. (*Sturtevant v. Vogel,* 9 Cir., 167 Fed. 448, 450.)

The first regular session of the Territorial Legislature convened March 3, 1913. One of the first laws enacted, by it was: "An Act to supplement the mining laws of the United States in their application to the Territory of Alaska * * *." (Ch. 74, Session Laws 1913, p. 283.)

This Act, *inter alia,* required certificates of locations of mining claims to be recorded and prescribed their content. The Act was substantially the same as the Act of 1915, by which, in conjunction with Sec. 2324, Revised Statutes, the validity of appellee's certificate of location must be tested.

The celerity with which the Alaska Legislature enacted this beneficial and remedial legislation—in its desire to guard against floating and fraudulent locations—demonstrates its great importance to the prospectors and miners of Alaska.

In *Butte City Water Co. v. Baker,* 196 U. S. 119, 128, this Court, in speaking, of the *importance of this character of legislation,* says:

> "It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary, are rather suggested by Section 2324. *It may* well be that *the State Legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and corner posts should be, at the very beginning placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.*"

In *Faxon v. Banard,* 4 Fed. 702, 705, it is said:

> "The government gives its lands to those citizens who may discover precious metal ores therein, *upon condition that they will define the site of the ground with such certainty as may be necessary to prevent mistakes on the part of the government and on the part of other citizens who may ask a like bounty. This is reasonable and necessary to justly administer the law, and, therefore, it must be said that without such description, a certificate of location is void.*"

The importance of this character of legislation is also recognized, by the Circuit Court of Appeals, for the Ninth Circuit, in *Vedin v. McConnell,* supra, where the Court said:

> "For the reasons which have often been explained, the courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations. But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; *and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law.* Without deciding that each of the defects would, in itself, be fatal, it is to be noted that the certificate fails to disclose the width of the claim, to give a description by reference to numbered stakes or monuments (Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153), to state the date of the discovery or posting of location notice, *or to tie the claim to any permanent monument or natural object, except by the vague and wholly inadequate reference to 'Cleary Creek' and 'Latanika'.*"

Mr. *Lindley,* in his work *on Mines* (3d ed.), Sec. 379, in speaking of the importance of "certificates of location", said:

> "By the term 'certificate of location', we mean the instrument prepared by the locator after the completion of the development work and the marking of his location, which certificate is required by the state laws or local rules to be

recorded. This instrument when recorded is a *statutory writing affecting realty, being, in the state or localities where it is required, the basis of the miner's 'right of exclusive possession' of his mining location granted by the laws of congress. It is the first muniment of his paper title,* upon the record of which proceedings for patent are based, and as recorded is intended to impart constructive notice to all subsequent locators of the existence of the claim, its precise locality and extent, as the marking of the location on the ground is intended to impart actual notice of these facts. The preliminary posted notice performs a temporary function; *the recorded certificate a more permanent one. This recorded certificate, notice, or declaratory statement, by whatever name it may be called, is the genesis of the locator's paper title."*

And in speaking of the *"Effect of failure to comply with the law as to contents of certificates"*, Mr. Lindley, in Sec. 384, says:

"It follows from what we have heretofore said that any *notice or certificate of location* which is used as the basis of the record which fails to reasonably comply with the *requirements of the federal law as to contents of such record is ineffectual and void."*

II.

THE CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT, IN ITS REFUSAL TO INSTRUCT THE JURY, AS REQUESTED BY THE DEFENDANT.

A. On the issue of actual possession under claim and color of title (R. 229); and,

B. That a mere intruder upon a claim in the actual possession of another cannot make his wrongdoing successful by asserting flaws in the title of the one against whom the wrong has been by him committed. (R. 230.)

(A) Error of the Court in refusing to instruct the jury as requested by defendants on the issue of actual possession under claim and color of title.

The amended answer alleges that when plaintiff attempted to locate the Good Hope claim on October 27, 1930, the ground included therein was not unappropriated government land, but was the property of Sheppard and was in the actual possession of the defendant company under a written lease. That the company was mining and dredging thereon, and that Sakow was a trespasser. (R. 7, 8.)

Defendants' evidence shows that the company took actual possession of the Bluebird and North Star claims immediately after the lease was executed on August 14, 1930. (R. 117.) That it did "a lot of work" * * * "several thousand dollars worth" of work upon them in 1930. That the work consisted of clearing brush, laying pipe lines, digging ditches, and thawing frozen gravels preparatory to "dredging operations". (R. 117, 118.) This testimony is uncontradicted.

The defendants contended at the trial that the acts of Sheppard in locating the Bluebird and North Star claims by: (1) making discoveries of gold (R. 106); (2) marking the boundaries of the claims upon the ground so that they could be readily traced (R. 101-106); (3) posting location notices upon the initial stakes (R. 106, 107); (4) recording location certificates (R. 107-111); (5) performing the annual labor required by law for assessment years 1927-1928, 1928-1929, 1929-1930, 1930-1931, and filing affidavits of labor in proof thereof (R. 114-119, 172); and (6) *the fact that the Investment Company was in the actual physical occupancy of the ground under a written lease, engaged in clearing brush and thawing frozen ground preparatory to dredging operations* (Affidavit of Labor (R. 118), constituted actual possession of the Bluebird and North Star claims under claim and color of right and title, and that by reason thereof the ground which plaintiff attempted to locate on October 27, 1930, was not vacant, unoccupied land of the United States, open to location, for mining purposes.

In order that this issue might be clearly presented to the jury, the defendants requested the Court to instruct them, as follows (R. 229):

> "You are instructed that if you believe that the defendant Sheppard, on July 6, 1926, (1) made a discovery of gold within the boundaries of the Blue Bird and North Star claims, (2) marked the boundaries upon the ground so that they could be readily traced and erected the necessary posts as I have hereinbefore instructed you,

and posted notices of location on each of said claims, and within ninety days after the discovery of gold and the posting of the location notices, caused to be recorded in the office of the Recorder of the Otter Precinct, certificates of location as required by law and, (3) thereafter performed the annual labor required by law, and that on August 14, 1930, the said Sheppard leased said mining claims to the J. E. Riley Investment Company and that the said J. E. Riley Investment Company, as lessee, thereupon entered upon the actual possession of said claims and began work thereon for the purposes of preparing said ground for dredging, and that said work was carried on by the said J. E. Riley Investment Company until the end of the mining season of 1930, then I instruct you that said acts of said Sheppard and of said lessee constituted an actual occupation and possession of said mining claim by the J. E. Riley Investment Company, and that the ground included within the boundaries of said North Star and Blue Bird claims would not be open to location by the plaintiff or any other person for the reason that said claims were in the actual possession of others under claim and color of right, and were not, therefore, vacant and unoccupied ground of the United States subject to location." (R. 229.)

This instruction the trial Court refused to give (R. 229), nor, was there any instruction given, *covering this issue.* (R. 235-254.)

B. The defendants also requested the Court to instruct the jury, as follows:

> "That a mere intruder and trespasser upon a claim in the actual possession of another cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed." (R. 230.)

This instruction the trial Court also refused to give (R. 230), nor, was any instruction given by the Court covering this issue. (R. 235-254.)

The only allusion, by the Circuit Court of Appeals to this vital question, is the statement "Other errors were assigned but we find none warranting a reversal". (Post, appendix p. vi, R. 452.)

REASONS FOR GRANTING A WRIT OF CERTIORARI TO REVIEW THIS QUESTION.

The Circuit Court of Appeals, in affirming the action of the trial Court, in refusing to instruct the jury on one of the most vital issues presented by the pleadings and evidence, has decided an important question of Federal and Territorial law:

A. Contrary to, and in conflict with, the applicable decisions of this court in the following cases:

Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 73;
Hawes v. Victoria Copper Min. Co., 160 U. S. 303, 40 L. ed. 436;
Clipper Min. Co. v. Ely Min. Co., 194 U. S. 220, 231, 48 L. ed. 944.

B. Contrary to, and in conflict with, *its own decisions, and particularly, those in appeals from Alaska, in the following cases:*

McIntosh v. Price, 121 Fed. 716, 718;
Rooney v. Barnette, 200 Fed. 700, 705.

C. The Circuit Court of Appeals has sanctioned a departure from the usual course of judicial procedure, by allowing an intruder and trespasser on mining claims in the actual possession of another, to make his wrongdoing successful by asserting flaws in the titles of the persons whom he has wronged.

In *McIntosh v. Price,* 121 Fed. 718, the Circuit Court of Appeal, said:

> "The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one *who has located a placer claim in an attempted compliance with the mining rules and laws,* and who is actually engaged in mining upon that portion of his claim. A case directly decisive of the question is Haws v. Victoria Copper Mining Company, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. ed. 436. In that case the Victoria Mining Company was in possession of land and was engaged in working a certain mining claim. One of its employes discovering what he conceived to be fatal defects in the location notices of the claims, conceived the secret intention of taking possession of the property for his own benefit, secured the assistance of another, and made locations on the ground then occupied by his employer, set stakes and posts with notices, and in the night time ousted the mining company from its possession. The court held that such an intruder and trespasser could not make his wrongdoing successful by asserting a flaw in the title of him against whom the wrong had been

committed. In Eilers v. Boatman and others, 111 U. S. 357, 4 Sup. Ct. 432, 28 L. ed. 454, the Supreme Court, affirming the decision of the Territorial Court of Utah in Eilers v. Boatman, 3 Utah 167, 2 Pac. 66, *held that one cannot locate ground on which another is in the actual possession under claim and color of right, because such ground is not vacant and unoccupied.*" (Italics ours.)

Said the Circuit Court of Appeals in *Rooney v. Barnette* (Alaska), 200 Fed. 700, 705:

> "*The present action is a suit in ejectment.* It is elementary law that a plaintiff in ejectment must recover upon the strength of his own title, which must be sufficiently established to warrant a verdict in his favor. *A mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed.*" (Italics ours.)

These decisions are most pertinent to the facts of this case.

Wherefore, your petitioners pray, that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and to mail to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of all proceedings in this case, numbered on the docket of said Court, No. 9237; that judgment therein be reversed by this Honorable Court; and

that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
June 3, 1940.

J. JOSEPH SULLIVAN,
Attorney for Petitioners.

JULIEN A. HURLEY,
CHARLES E. TAYLOR,
JOHN L. MCGINN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
June 3, 1940.

J. JOSEPH SULLIVAN,
Attorney for Petitioners.